Supreme Court, U.S.
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No. 06-1206

IN THE

Supreme Court of the United States

J.H. FLETCHER & CO.,

Petitioner,

v.

JERRILL DAVIS and VIRGINIA DAVIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

There is nothing about the policies underlying the federal preemption doctrine, or the case law applying it, that requires preemption to operate on an "all-or-nothing" basis. It makes eminent sense that, within a given statutory scheme, there can be some provisions that warrant preemptive effect and some that do not. Respondents offer no argument that comes to grips with, let alone disputes, this proposition, probably because no federal court has held otherwise. The failure to recognize that is what led the West Virginia Supreme Court of Appeals astray. That is why this Petition for a Writ of Certiorari presents an important question of federal law fit for clarification. What this Court has to say about this question will be relevant every time a statutory preemption question is raised.

I. This Court Clearly has Jurisdiction.

Offering no substantive basis for their claim that the writ should be denied, Respondents pitch their Opposition on other grounds. They contend that this Court lacks jurisdiction because the "final judgment" requirement of 28 U.S.C. § 1257(a) (1988) has not been met. Yet, ironically, the principal authority that Respondents cite for that argument, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), demonstrates its falsity here.

The case at bar fits well within the types of cases the *Cox* Court identified as subject to review in this Court even if it can be argued that the case underlying the decision at issue has not been litigated to conclusion. Specifically, it qualifies for the fourth *Cox* category, affirming jurisdiction in this Court "where the federal issue has been finally decided in the state courts" and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83. *See also Ft. Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989).

In explaining the origins of this category, this Court cited earlier cases such as *Construction Laborers v. Curry*, 371 U.S. 542 (1963), in which "the power of the state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review in this Court," *Cox*, 420

U.S. at 483, and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) in which the application of a federal statute was deemed a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558.

This case is precisely the type contemplated by the fourth *Cox* category, as reversal of the West Virginia Supreme Court of Appeals ruling on the preemption issue would in fact preclude any further proceedings in this case. Yet Respondents ignore this obvious truth and merely assert that there would be no risk of eroding federal policy (one of the stated concerns of this Court in articulating this particular exception) by allowing this case to proceed to trial. But that very concern is exactly why this Court should grant review now. As explained in the Petition, the federal Mine Safety and Health Administration has developed a comprehensive set of regulations applicable to the dust suppression systems in roof bolting machines that the agency applies exclusively. To allow unpredictable and potentially inconsistent tort litigation to interfere with this regulatory regime would present a clear erosive threat to this area of federal policy.

II. This Case Presents Compelling Unresolved Issues of Federal Preemption.

Respondents contend that because there are no conflicting federal or state decisions, other than the decision below, there is nothing to justify this Court's intervention. But Rule 10(c) of this Court's rules blows away that smokescreen. This is a case fit for the granting of the writ because "a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The Petition openly acknowledges that no federal court has yet construed the preemption and savings clause provisions of the federal Mine Safety and Health Act, 30 U.S.C. § 955 (2000). Neither has any federal court determined whether federal law

may preempt a discrete area even though the broader regime of which it is a part otherwise allows for the coexistence of state law that is not inconsistent with federal law. (Pet. at 7-8.) These are important issues that merit review here.

III. State Regulation Via Tort Litigation is Precluded on Conflict Preemption Grounds.

To give effect to congressional intent, field preemption in the regulation of dry dust suppression systems in roof bolting machines is required. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990). In this case, the comprehensive nature of the regulatory apparatus applicable to these machines shows that it makes no sense to permit additional "regulation" in this highly technical area through lay jury verdicts. Put simply, the law makes the federal regulatory agency the final arbiter of machine design and safety. The basic principles of conflict preemption thereby preclude interfering jury verdicts. As this Court stated only recently, state regulation of nationally regulated entities is permissible only "where doing so does not prevent or significantly interfere with" the exercise of federal regulatory authority. It is not permissible where "state prescriptions significantly impair the exercise of [federal] authority, enumerated or incidental" under the relevant federal statute. *Watters v. Wachovia Bank N.A.*, 127 S.Ct. 1559, 1567 (2007). *See also United States v. Locke*, 529 U.S. 89, 106 (2000).

Respondents' Opposition does not even mention that the federal regulations governing Petitioner Fletcher's product require that any design or labeling changes be submitted to the MSHA for approval in a process nearly as rigorous as the initial approval process. 30 C.F.R. § 33.12 (2006). That is why no jury in West Virginia or any other state can have the last word in this area. From the moment of entry, a jury verdict of negligence will conflict with federal law if it is against a manufacturer who is otherwise in compliance with federal

MSHA regulations. At best, the jury verdict can be regarded as a recommendation, but MSHA must ultimately determine all issues of permissible design. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (there is conflict preemption when "it is impossible to comply with both state and federal law"). Accordingly, the principles of conflict preemption dictate that the joint operation of state and federal law in this field cannot be tolerated.

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) presents an example of inherent incompatibility that is instructive. That case involved medical devices that were required to undergo thorough review by the Food and Drug Administration. In view of the detailed FDA regulatory regime, this Court held state tort suits preempted by the federal law. The parallels with this case are plain and strongly support the grant of the writ to carry out the intent of Congress by foreclosing the inevitable conflicts that must ensue if tort verdicts are permitted to override the carefully wrought roof bolting/dry dust suppression rules of the Mine Safety and Health Administration.

IV. The Language of the Statute is Not to the Contrary.

In many areas, the MSHA permits the operation of "any State law or regulation" if it is more stringent than federal protections. But that statutory language strongly suggests that Congress envisaged the operation of such state laws, in certain areas, only if they are promulgated by the legislature or state agencies. Unlike some cases in which state law was construed to include common law, the MSHA does not use the looser terminology found in those settings. The statute here, unlike those cases, does not refer to "requirements" or "standards"; it deliberately employs the more formal terms "law or regulation." In that respect, this case is fully aligned with those in which ad hoc jury verdicts have been deemed preempted. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (law or regulation "most naturally read as not encompassing common-law claims"); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 480 (1996) (language points to "enactments of positive law by legislative

or administrative bodies, not the application of general rules of common law by judges and juries").

Lacking any better argument, Respondents contend that Petitioners in the court below spoke to the contrary when they stated that "state law includes common law." But Respondents conveniently ignore the context of that reference in which Petitioners surveyed the landscape and noted that, although there were some decisions in which references to "state law" were deemed to include common law, in others only positive legislative or agency enactments were held to be embraced within that term. That observation was and is fully consistent with the argument presented here that the language of the MSHA evinces an intent to give effect to concurrent state law embodied in statutes or regulations, but not to jury verdicts that are instinct with potential for conflict with federal law.

CONCLUSION

For the foregoing reasons, this is a compelling case for granting the Writ of Certiorari to settle an important question of federal law that will govern both here and in many other cases. It will affect the conduct of many businesses with nationwide activity that must operate under statutes with at least some preemptive effect. This is thus an important opportunity for this Court to effect a critical clarification by holding that a regime of federal regulation may include some provisions that are preemptive and some that are not.

Respectfully submitted,

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